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the plaintiff's damages should be the value of the wrongful use to the defendant. Carried to its logical conclusion, such a theory would deprive the plaintiff of all damages, if the defendant had not benefited by his trespass. Obviously it should be immaterial whether the defendant profit or lose by the transaction. *Whitwham v. Coal & Coke Co.* (1896) L. R. 2 Ch. Div. 538, 543.

If the point of view be taken that the rental value of his land is what the plaintiff has lost by the defendant's trespass, then damages based on the value of the use and occupation may be brought within the orthodox rule. See Lopes L. J., *Whitwham v. Coal & Coke Co.*, supra. This, however, makes the action, in substance, one for mesne profits. *Western Book Co. v. Jevne* (1897) 78 Ill. App. 668. But in order to avoid the prevailing theory, that mesne profits may only be obtained where the plaintiff has first succeeded in ejectment, Tyler, Ejectment, 838, the courts have been obliged to extend this measure of damages to the ordinary action of trespass. However, in New York, by statute, mesne profits and ejectment have now been merged into one action, Code Civ. Proc. §§ 1496-7, and since a recent case has held that for the unauthorized stringing of wires over another's land ejectment would lie, *Butler v. Tel. Co.* (1905) 95 N. Y. Supp. 684; 6 COLUMBIA LAW REVIEW, 206, it is submitted that this was the proper remedy of the plaintiff in the principal case. Even assuming that the decisions justify the result reached, still the language of the court is too broad in indicating that the value of the use to the defendant should be a determining factor in estimating damages for a trespass to realty.

MASTER'S NON-LIABILITY FOR LABOR UNION'S CHOICE OF FELLOW-SERVANTS.—The common law duty of a master toward his servant to exercise reasonable care in the selection of competent fellow-servants, cannot be delegated to another. Nor can the master by contract with the servant absolve himself from liability for negligence in its discharge, such contracts being void as contravening public policy. *Johnston v. Fargo* (April 1906) 184 N. Y. —. Can he then, by acquiescence in the demands of organized laborers to choose their own fellow-servants, be relieved of that duty? This question recently came before the Supreme Court of Louisiana. The defendant, a stevedore, contracted to load a ship. By the rules of a labor organization, of which the plaintiff was a member, and which controlled the loading of ships in the harbor, the defendant was required to employ a foreman from the organization, and the latter chose the necessary workmen. The court held that the defendant was not liable for injuries resulting from the incompetence of fellow-servants chosen by the foreman. *Farmer v. Kearney* (La. 1905) 39 So. 967.

Although a servant cannot contract to relieve the master from liability for negligence, nevertheless, under the doctrine of assumption of risk, the law does recognize the status of master freed from

liability for negligence. The grounds for holding invalid a servant's contract to release the master from liability are, first, the servant cannot contract with the master on an equal footing, and, second, the state having an interest in the lives of its citizens, will not recognize a contract that would encourage laxity in the maintenance of proper safeguards to life and limb. In the principal case, however, the labor union was able to dictate terms to the master. There could, moreover, be no encouragement of laxity in the master's selecting, when the power of selection had been taken from him. The right of organized labor to dictate to the employer whom he shall employ, is perhaps not finally determined. The view most favorable to the unions was announced by Parker, C. J., in *National Protective Association v. Cummings* (1902) 170 N. Y. 315, 324, where the court said: "So long as workmen must assume all the risks of injury that may come to them through the carelessness of co-employees, they have a moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services." It would seem to follow that if they dictate by this right, whom the master shall employ, they must assume the duty of selecting competent co-employees. If, however, the view be adopted that workmen have no right so to dictate, and if the master upon their demand surrenders his right to choose his servants, since the law does recognize the status of master freed from liability for negligence, and since, as has been shown, no reasons of public policy demand that his liability continue, and since, as a matter of fact, he cannot be guilty of negligence in choosing when he cannot choose, the principal case is still to be supported.

Does this leave the individual workman without protection against careless selection of his fellow-servants? It is not contended that accidents due to incompetence are to be abolished by shifting the power of selecting servants to agencies of their own choosing. But with the shifting of the power, should there not be a shifting of the liability? The character and liability of a labor union toward its members have not been clearly determined. The compulsory methods it employs toward individual workmen negative the identity of the union and the members composing it. Of further significance in this connection is the fact that unincorporated trade unions have been held legal entities with respect to their tort liability. *Taffvale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426; *U. S. Heater Co. v. Iron Moulders' Union* (1902) 129 Mich. 354; 1 COLUMBIA LAW REVIEW 546. When the union undertakes to arrange with the master the scale of wages and working hours, to dictate who shall perform the work, as well as the manner and method of its performance, leaving to the master only the right to say what work shall be done, it assumes a position analogous to that of an independent contractor. It is not improbable that a corresponding liability imposed upon the union would operate as a beneficial check on the exercise of its extensive powers.